



Amberley Gavel Ltd.

April 2, 2015

Andrew Brouwer,
Director of Legislative Services/Town Clerk
Town of Newmarket,
395 Mulock Drive, P.O. Box 328, STN Main
Newmarket, ON
L3Y 4X

CORPORATE SERVICES		
INCOMING MAIL	REFD TO	COPY TO
APR 15 2015		

Re: Alleged improperly closed meetings of the Council of the Town of Newmarket on December 10, 2014 and of Council as Committee of the Whole on January 26, 2015.

Dear Mr. Brouwer:

Attached is our report into allegations of improperly closed meetings of Council as noted above.

This report is to be made public by Council, and in order to do so we suggest that it be placed on the agenda of the next meeting of Town Council.

We thank you for your co-operation and that of of other Town staff and in providing us with information relevant to the preparation this report.

Sincerely yours,

Nigel Bellchamber
Amberley Gavel Ltd.

**REPORT TO
THE CORPORATION OF THE TOWN OF NEWMARKET REGARDING THE
INVESTIGATION OF THE MEETINGS OF COUNCIL FOR THE TOWN OF
NEWMARKET IN CLOSED SESSION OF COUNCIL
ON DECEMBER 10, 2014 AND AS COMMITTEE OF THE WHOLE
ON JANUARY 26, 2015**

I. COMPLAINT

The Corporation of the Town of Newmarket (“Town”) received a complaint about a closed session of Town Council on December 10, 2014 and a Special Meeting of the Committee of the Whole for Town Council (“Committee of the Whole”) in closed session held on January 26, 2015. The essence of the complaint is that the holding of these closed meetings were in contravention of the open meetings provision of the *Municipal Act, 2001*¹, as amended by Bill 130² (“*Municipal Act*” or “*Act*”).

This request was sent to the offices of Amberley Gavel Ltd. (“Amberley Gavel”) for investigation.

II. JURISDICTION

The Town appointed Local Authority Services (LAS) as its closed meeting investigator pursuant to section 239.2 of the *Municipal Act*.

LAS has delegated its powers and duties to Amberley Gavel to undertake the investigation and report to Town Council.

III. BACKGROUND

Section 239 of the *Municipal Act* provides that all meetings of a municipal council, local board or a committee of either of them shall be open to the public. This requirement is one of the elements of transparent local government.

¹ S.O. 2001, c. 25.

² *Bill 130: An Act to amend various Acts in relation to municipalities*, S.O. 2006, c. 32 (“Bill 130”).

The section sets forth exceptions to this open meetings rule. It lists the reasons for which a meeting, or a portion of a meeting, may be closed to the public. The section confers discretion on a council or local board to decide whether or not a closed meeting is required for a particular matter. That is, it is not required to move into closed session if it does not feel the matter warrants a closed session discussion.

Section 239 reads in part as follows:

Meetings open to public

239. (1) Except as provided in this section, all meetings shall be open to the public.
2001, c. 25, s. 239 (1).

Exceptions

(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

- (a) the security of the property of the municipality or local board;
- (b) personal matters about an identifiable individual, including municipal or local board employees;
- (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
- (d) labour relations or employee negotiations;
- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- (g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act. 2001, c. 25, s. 239 (2).

The *Act* also provides for closed sessions of a council, board, or committee when engaged in educational or training purposes:

- (3.1) A meeting of a council or local board or of a committee of either of them may be closed to the public if the following conditions are both satisfied:
 - 1. The meeting is held for the purpose of educating or training the members.
 - 2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

The *Act*, under subsections 239(5) and 239(6), does not permit a council, committee, or local board to vote while in closed session unless the *Act* requires or permits the meeting to be closed by virtue of one of its exceptions and the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board.

IV. INVESTIGATION

Since the two complaints engaged substantially the same or similar matters, we determined that they would be investigated together.

Documents provided by the Town and reviewed during the course of the investigation included the Agenda and Minutes of the Open and Closed Sessions of Council on December 10, 2014 and of the Special Committee of the Whole Meeting on January 26, 2015, documents received during the Closed Session on January 26, 2015, and other relevant documentation. The video for the Open Session on December 10, 2014 was also viewed.

The Town Clerk ("Clerk"), the Deputy Clerk, and the Director of Legal Services/Municipal Solicitor ("Director of Legal Services") were consulted during the course of the investigation.

BACKGROUND

(a) Agenda for the Meeting of Council on December 10, 2014

The Agenda for the December 10, 2014 meeting shows that the meeting was in the form of a "Council Workshop" which was to commence at 9:00 a.m. in open session. A "Notice" was placed at the top of the Agenda which indicated that:

In accordance with the Town's Procedure By-law, no decisions are to be made but rather this meeting is an opportunity for Council to have informal discussion regarding various matters.

The Agenda contained the following item:

5. Educational/Training Session - Bus Tour – 1:00 p.m. – 4:00 p.m.

Recommendation:

THAT the Council Workshop resolve into Closed Session for the purpose of an educational/training session under Section 239(3.1) of the Municipal Act, regarding strategic matters and inter-municipal relations.

(b) Minutes of the Meeting of Council on December 10, 2014

The Minutes for Council Workshop on December 10, 2014 indicate that the workshop commenced at 9:13 a.m. in open session. At 12:30 p.m., the meeting went into closed session. Council immediately recessed for lunch and then resumed in closed session at 1:15 p.m. The workshop went back into open session at 4:25 p.m. and was adjourned. There was no reporting out from the closed session.

(c) Minutes for the Closed Meeting of Council on December 10, 2014

The Minutes for the closed session of the Council Workshop show that seven Members of Council, accompanied by thirteen members of staff, went on a bus tour of the municipality. Staff updated Council about sixteen sites in the municipality, including their significance to the municipality. No decisions were made in closed session, other than to resolve back into open session at 4:25 p.m.

(d) Agenda of the Meeting of the Special Committee of the Whole on January 26, 2015

The Agenda for the January 26, 2015 Special Committee of the Whole Meeting indicates that Committee of the Whole would be going into closed session to hear a presentation from the Director of Legal Services “regarding proposed or pending acquisition and/or disposition of land – Strategic Properties”.

(e) Minutes of the Special Meeting of Committee of the Whole on January 26, 2015

The Minutes for Special Committee of the Whole meeting on January 26, 2015 indicate that Committee of the Whole went into closed session at 1:53 p.m. as follows:

THAT the Special Committee of the Whole resolve into a Closed Session for the purpose of discussing proposed or pending acquisition and/or disposition of land regarding Strategic Properties across the Town of Newmarket.³

The Meeting went back into open session at 5:01 p.m. and was then adjourned. There was no reporting out from the closed session.

(f) Minutes for the Closed Special Meeting of Committee of the Whole on January 26, 2015

The Minutes for the closed session of the Special Committee of the Whole show that the Director of Legal Services provided Members of Council with a presentation about various properties that the municipality was attempting to acquire or dispose of. Various directions were given to staff in the form of resolutions. Committee of the Whole made two substantive decisions about a particular property while in closed session.

³ Although not strictly required by the *Municipal Act*, the resolution to go into closed session does not cite the authority under the *Act* for the holding of a closed meeting. In this case, it would have been authorized under section 239(2)(c).

V. ANALYSIS AND FINDINGS

(a) The Closed Meeting of Council on December 10, 2014

The Clerk advised that the meeting was closed to the public merely for practical reasons in that Council would be on a *bus*, and not in their regular meeting location. Both the Clerk and the Director of Legal Services, who were present during the tour, confirmed that there was no discussions or decisions that materially advanced the business of the municipality or that set the ground for future decision making.

The bus tour was part of the orientation program for Members of Council. Its purpose was to give Members of Council, especially those who were new to Council, a physical view of the various properties of significance to the municipality.

The Clerk felt that he had to schedule this as a closed meeting since the Members of Council would be travelling together as a group; in other words, there would be a quorum of Council on this particular tour. However, Members of Council were clearly given notice that no decisions would be made and Members of Council abided by that notice.

Although Council resolved to go into closed session at 12:30 p.m., the closed session did not start until 1:15 p.m. Members of Council were given a period of 45 minutes, from 12:30 p.m. to 1:15 p.m., to have lunch and to conduct other business in their offices during this recess. Lunch was served for Members of Council and staff in the Council Chambers. The Deputy Clerk was in the Chambers for the lunch recess, along with other Clerk's staff, and she confirmed that individuals came in and out during that period of time and that no Town business was discussed.

The Clerk indicated that the vote to go into closed session was done before the recess out of procedural convenience. It would have been more difficult, and time consuming, to have Council return to the Council Chambers in open session after lunch and then recess into closed session. However, the resolution to have a closed session has to be done in open session. As such, it was more convenient and orderly to have the meeting recess into closed session just before lunch and have Members of Council return at the beginning of the bus tour in closed session.

Amberley Gavel does not feel that a lunch recess, even if the gathering is closed to the public, is automatically deemed to be a "meeting" just because Members of Council are together having lunch. The real issue is not about the gathering or the format, but about whether or not the business of the municipality is being discussed in a material sense. The Deputy Clerk, who was in the room the whole time, indicated that no Town business was discussed.

The Clerk indicated that no member of the public had shown an interest in attending the tour after the public agenda was posted. Further, the Clerk indicated that there was no reason why members of the public or the media could not have been on the tour. (Indeed, the bus driver could be characterized as a “member of the public” and he is shown as a “guest” in the minutes.) The Clerk further advised that the list of properties that had been visited was posted on the Town’s website on the following day.

The *Act* provides for closed sessions of a council when engaged in educational or training purposes if the meeting is held for the purpose of educating or training the members and if, at the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council. We have found that both conditions were satisfied. The bus tour was for the purpose of educating Members of Council about properties that were significant to the municipality and no Member of Council discussed or otherwise dealt with a matter in a way that materially advanced the business or decision-making of Council. Hence, we have found that Council was not in breach of the *Municipal Act* by being in closed session during this portion of the workshop.

(b) Closed Special Meeting of Committee of the Whole on January 26, 2015

The Director of Legal Services advised that she was providing Members of Council with a “high-level overview” of various properties that the municipality was in the process of acquiring or disposing of. This was an extension to Council’s orientation program, particularly for the new Members of Council who may have had no prior knowledge of these potential or pending acquisitions or dispositions. She was not seeking any direction or resolution from Committee of the Whole as a consequence of her presentation.

Having reviewed the Minutes of the Closed Meeting and the presentation materials provided by the Director of Legal Services, we have concluded that Committee of the Whole was properly in closed session on January 26, 2015 to discuss matters relating to the proposed or pending acquisition or disposition of land by the municipality.

However, Special Committee of the Whole made two decisions, by resolution, on a particular property while in closed session, with respect to negotiations about the property.⁴

Those decisions were more than just “procedural” in nature or “directions to staff”, as are permitted by the *Municipal Act*. Given the precise wording of the particular resolutions, we believe that Committee of the Whole would have been better to merely give the appropriate direction to staff rather than take a vote on the two matters.

⁴ It would be improper, for Amberley Gavel to discuss in this report the detailed substance of the closed meeting discussions, since disclosure would offend the principle of confidentiality that closed meetings protect. In addition, to do so would allow complainants and other third parties to receive information through a closed meeting investigation that they would otherwise not be privy to; that is not the function of a closed meeting investigation. That is not to say that the complainant in this instance was attempting to do that, but rather that the possibility could be contemplated in other instances.

This is particularly true in circumstances where staff are not asking for direction as a result of a “high-level overview” presentation.

We are not concluding that these two resolutions were illegal votes under the *Municipal Act*; rather, we are cautioning Council to craft all resolutions as directions to staff rather than what could be read to be substantive and binding decisions, unless such resolutions are merely procedural in nature.

VI. CONCLUSION

Amberley Gavel has concluded that Council did not breach the open meetings requirement of the *Municipal Act* in closing its workshop to the public on December 10, 2014 in order to travel by bus to strategic sites. We have also concluded that Council did not breach the open meetings requirement of the *Municipal Act* in closing its Special Committee of the Whole Meeting to the public on January 26, 2015. We have, however, cautioned Council about making what appear, by their wording, to be substantive decisions in closed session rather than directions to staff or other officers.

VII. RECOMMENDATIONS

As a result of the investigation, we offer several suggestions in accordance with best practices. Although not strictly required by the *Municipal Act*, these recommendations enhance openness and transparency:

- (a) THAT, when resolving to go into closed session, the Town Council, its committees, and local boards cite the applicable section of the *Municipal Act* which permits the holding of a closed session.
- (b) THAT the Town Council, its committees, and local boards report out from its closed session stating the general nature of the matters discussed in closed session.
- (c) THAT Town Council, its committees, and local boards not make substantive decisions in closed session. All matters should be worded as directions to staff or other officers.

VII. PUBLIC REPORT

We received full co-operation from all parties that we contacted and we thank them.

This report is forwarded to the Council of the Town of Newmarket. The *Municipal Act* provides that this report be made public. It is suggested that the report be included on the agenda of the next regular meeting of Council or at a special meeting called for the purpose of receiving this report prior to the next regular meeting.



For AMBERLEY GAVEL LTD.

March 2015